IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

THOMAS M. SAUL
Staff Sergeant (E-5),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0098/AF

Crim. App. Dkt. No. ACM 40341

REPLY BRIEF ON BEHALF OF APPELLANT

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW, Appellant, Staff Sergeant (SSgt) Thomas M. Saul, by and through his undersigned counsel pursuant to Rule 19(b)(3) of this Honorable Court's Rules of Practice and Procedure, hereby replies to the Government's Brief on Behalf of the United States filed on August 7, 2024 (Appellee Br.). Appellant relies on the facts, law, and arguments filed with this Court on July 8, 2024 (Opening Br.) and provides the following additional arguments for this Court's consideration.

ARGUMENT

1. The military judge's inferences used to overcome SSgt Saul's blatant denial of intent to destroy the windshield were impermissible.

The military judge erred by using impermissible inferences to accept SSgt Saul's guilty plea in spite of his steadfast refusal to admit having had an intent to destroy the windshield. The Government leans into this error by proclaiming that

"[i]t is well-established in criminal law that a factfinder may (but is not required to) infer a defendant's specific intent by considering the natural and probable consequences of a defendant's voluntary acts." (Appellee Br. at 11.) True, but only during contested findings. *United States v. Davenport*, 9 M.J. 364, 366-67 (C.M.A. 1980) (limiting the guilty-in-fact analysis of a providence inquiry to the accused's clear admissions); *United States v. Janer*, No. 27904, 1989 CMR LEXIS 1046, *4 (A.F.C.M.R. Nov. 15, 1989) (holding that a military judge has "no choice" to make findings by permissible inference during a plea inquiry, but "is bound by the factual assertions of the accused"). This is not the standard afforded during a providence inquiry where the military judge's assessment of an accused's admissions is constitutionally narrowed. To that end, the Government ascribes far greater latitude to the military judge than the law permits.

A guilty plea cannot stand unless it is "voluntary in a constitutional sense." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976). To satisfy this requirement, the accused must provide an "intelligent admission," of the criminal conduct that apprehends the "true nature of the charge against him." *Id.* at 644-45. To admit the criminal element of intent, is not enough to show that the accused's actions would have "inevitably" produced the charged result. *Id.* at 645. Rather, the accused's admissions must foreclose the possible inference of a lesser state of mental culpability than that being pleaded guilty to. *Id.* at 646.

This rigid, yet constitutionally required principle, is reflected in Article 45, Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 845 (2018). Although not mentioned in the Government's brief, this statute narrows the scope of actions that a military judge may endeavor in while assessing the factual basis of a guilty plea. "If an accused . . . after a plea of guilty sets up a matter inconsistent with the plea . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty." Article 45(a), 10 U.S.C. § 845 (2018). The importance of this narrowed scope in military practice is emphasized by the differing standard in Federal Procedure, which does not explicitly require the rejection of a guilty plea when "matters inconsistent" are raised. FED. R. CRIM. P. 11.

A plea of guilty cannot be entered where there is an insufficient factual basis to support a conviction brought on by the accused's denial of having committed one of the elements. *North Carolina v. Alford*, 400 U.S. 25, 38 n.10 (1970). ("Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea.")

Yet, the Government anchors itself on a different standard that applies only to contested findings and relies primarily on cases where a conviction was entered contrary to the accused's pleas.[1] (Appellee Br. at 10.)

United States v. Johnson, 24 M.J. 101 (C.M.A. 1987), a case involving contested findings, does not allow for a permissible inference to be made during a guilty plea. (Appellee Br. at 12.) Even if such an inference were not barred by Article 45, the one drawn out in that case is of a different category than that seen here. After SSgt Saul's denial, the military judge emphasized whether SSgt Saul was aware that destruction of the windshield might be a "natural and probable consequence" of his actions. (JA at 76.) But even *Johnson* does not stand for the proposition that appreciating "natural and probable consequence" could lead to a permissible inference of intent.

[1] The Government also cites to unpublished cases from other jurisdictions to assert that the military judge could use circumstantial evidence to fill in gaps in SSgt Saul's providence inquiry. (Appellee Br. at 21.) Neither of these cases apply here. *See United States v. Espinosa*, No. 20-50 787, 2021 U.S. App. LEXIS 31522, at *7 (5th Cir. Oct. 20, 2021) (holding that the appellant's assertion on appeal that his admission during the plea inquiry as to involvement in drug distribution was unsound in light of circumstantial evidence verifying his admission); *State v. Valdez*, No. A19-1477, 2020 Minn. App. Unpub. LEXIS 747, *7 (Aug. 31, 2020) (declining to affirm a guilty plea where the accused did not admit engaging in criminal action towards the victim and holding that no inference could be drawn without an admission to that conduct.)

Rather, that case holds that a panel in a contested court-martial may infer intent where the accused would have known that the result of their actions was "almost certain." *Johnson*, 24 M.J. at 105-106. The Government seems to recognize this distinction by shifting the argument to say that the "almost certain" (vice "natural and probable") consequence of SSgt Saul's actions created the inference that he intended it. (Appellee Br. at 13.) However, this assertion fails because the providence inquiry had no discussion by which SSgt Paul admitted the destruction was "almost certain." And even if it was discussed, the military judge still would have had to make an impermissible inference that SSgt Paul intended for the "almost certain" result.

The Government's reliance on *United States v. George*, 35 C.M.R. 801 (A.F.B.R. 1965) is similarly misplaced. (Appellee Br. at 10.) As a case involving contested findings, it has no relevance to SSgt Saul's providence inquiry. The military judge was not empowered to make inferences based on SSgt Saul's admissions concerning "natural and probable" consequences. Rather, it was the military judge's responsibility to gather a factual basis directly from SSgt Saul that would foreclose any mental state only supporting a lesser uncharged offense. *Henderson*, 426 U.S. at 645 (holding that a guilty plea is invalid where the factual basis presented by an accused does not foreclose the possibility that the accused had a non-culpable mental state).

Yet, the notion that Appellant intended to damage the windshield, to the exclusion of any lesser mental state, was unsupported by the record and unresolved by the military judge's follow-up questions. To the contrary, Appellant denied having the intention of destroying the windshield, stating: "I did not intend to break the windshield, but did intend to hit it in the first place." (JA at 28.) "My specific goal wasn't to completely demolish, or annihilate, or damage the window, but my intent was to hit the windshield with a large amount of force." (JA at 48.) Elsewhere, Appellant showed surprise at the results of his actions, explaining "I didn't actually know I damaged the vehicle in the very beginning until I looked at it," (JA at 47), and that he did realize it was damaged until he walked away some distance and was alerted to the damage by his wife. (JA at 48.) These contradictions between the plea and the providence inquiry required more follow-up to resolve. However, SSgt Saul never reneged on his assertion that he lacked intent.

The Government's position is also unsupported by *United States v. Willis*, 46 M.J. 258 (C.A.A.F. 1997). (Appellee Br. at 18.) In that case, this Court held that a plea agreement was valid despite the accused not articulating a specific intent to carry out an attempted murder against his uncle, whom he was unaware would be caught in crossfire while the accused discharged a firearm with the intent of harming others. *Id.* at 261-62. However, that case was decided under the doctrines of "transferred-intent" and "concurrent-intent theory." 46 M.J. at 258. It does not

support the proposition that acknowledgement of a "natural and probable" consequence of an accused's actions can sustain a guilty plea where the accused denies intent. (Appellee Br. at 19.)

In *Willis*, this Court held that the accused's intent to harm others could be inferred upon the unintended victim. *Id.* at 261-62. The "natural and probable" consequences of the accused's actions were relevant only because of this transferred intent. *Id.* In the case at bar, SSgt Saul expressed no intent to damage anything, including the windshield. Without an intention of destroying a different object which could be inferred upon the windshield, the "natural and probable consequences" of Appellant's action do not overcome his disavowal of intention to destroy it. *Willis* thus fails to advance the Government's position.

2. SSgt Saul's factual admissions do not establish "intent" and "willfulness" within their accepted definitions.

The facts admitted by SSgt Saul are insufficient to establish "intent" or "willfulness" based on their accepted definitions. The military judge erred by stretching these concepts to encompass SSgt Saul's mere acknowledgement of potential "natural and probable" consequences following his actions, despite his denial of intent. (Appellee Br. at 24.) Contrary to the Government's assertions, the definition of wantonness supplied in the *Manual for Courts-Martial* entry for reckless endangerment under Article 114, UCMJ, does not allow for the conclusion that "[t]he willfulness standard includes a 'disregard of *probable* consequences.'"

(Appellee Br. at 24.); M.C.M., pt. IV, ¶ 52.c.(1)(d). Importantly, reckless endangerment is a general intent crime, whereas destruction of property requires a specific intent. *United States v. Greene*, 43 C.M.R. 137, 138 (U.S.C.M.A. 1971) (holding that voluntary intoxication is relevant to whether the accused had a specific intent to willfully destroy military property). This is so because "[a]n act is done 'willfully' if done voluntarily and purposely with the specific intent to do that which the law forbids." *Id.* (*quoting James v. United States*, 366 U.S. 213 (1961)).

Specific intent is different than merely disregarding "natural and probable" consequences of one's actions. Rather, it requires that an accused intends those consequences. *Willis*, 46 M.J. at 261 (limiting culpability for specific intent crime to where accused has an intent to produce the natural and probable consequences of the act); *United States v. Valdez*, 40 M.J. 491, 495 (C.A.A.F. 1994) (affirming panel instruction defining specific intent to commit unpremeditated murder as when "a person *intends* the natural and probable result of an act") (emphasis added); *United States v. Jackson*, 19 C.M.R. 319, 327-28 (C.M.A. 1955) (finding insufficient evidence to support specific intent regardless of whether death of victim was a probable result of criminal enterprise because accused did not act with the purpose of causing death). The Government appears to agree with this in reference to how "willfully" is defined in the *Manual for Courts-Martial* for willful dereliction of duty. (Appellee Br. at 24.) This definition also regards specific intent as one where

the accused acts "knowingly and purposely, specifically intending the natural and probable consequences of the act." M.C.M., pt. IV, ¶ 18.c.(3)(c).

Given this, the Government interpretation of Article 114 does not supply a lower standard for establishing specific intent. As a general intent crime, Article 114 does not require an accused have a specific intent to produce the "natural and probable" consequences of their actions. A more coherent reading of Article 114's definition of "wanton," is to say that willful actions may prove wantonness, but that the reverse is not true. *See Counterman v. Colorado*, 600 U.S. 66, 78-79 (2023) (recognizing a hierarchy of criminal mental states in which "purposefulness" is a heightened state of culpability that subsumes "knowing" and "recklessness"). Indeed, the distinction between wantonness and specific intent, as separate states of mental culpability, was previously articulated by this Court's predecessor. *United States v. Roa*, 12 M.J. 210, 212 (C.M.A. 1982) ("Although a serviceperson may be convicted of murder if he commits homicide without an intent to kill, but with an intent to 'inflict great bodily harm,' *see* Article 118(2), or while 'engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life,' *see* Article 118(3), these states of mind do not suffice to establish attempted murder.")

The manual text supports this reading by suggesting that "'wanton' includes 'reckless' but *may connote* willfulness . . . ." M.C.M., pt. IV, ¶ 52.c.(1)(d) (emphasis

added).[2] The phrase "may connote" therefore simply explains that a disregard of probable consequences may, but does not necessarily, imply a willful intent to bring about those consequences. *See also United States v. Moore*, 12 U.S.C.M.A. 696, 702 (U.S. C.M.A. 1962) (holding that the natural and probable consequences of deliberate actions do not create the necessary inference of an intended criminal result). Thus, the definition of willfulness relied upon by the Government and the military judge was insufficient to establish a factual basis for the guilty plea. Per Article 45, the military judge could not simply deviate from the defined elements of the offense to make SSgt Saul's denial of intent fit into the crime he plead guilty to. Absent a wholesale retraction of SSgt Saul's denial and an admission to the requisite mental state, the military had to reject the guilty plea.

3. The military judge's questions following SSgt Saul's denial of intent were insufficient to resolve the inconsistent matter raised, thereby undermining the military judge's acceptance of the plea.

The military judge's follow-up inquiry failed to overcome SSgt Saul's denial of the criminal intent necessary to support his guilty plea. Ultimately, this case is not about whether the military judge could infer SSgt Saul's mental state, or about whether the definition of willfulness could be stretched to fit the matters that

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[2] The Government also cites to similar language in *United States v. Cooper*, No. 40092 (f rev), 2023 CCA LEXIS 7, *17 (A.F. Ct. Crim. App. January 11, 2023) (unpublished) for the same proposition that wanton conduct may connote willfulness. (Appellee Br. at 27.) The argument presented here with regard to Art. 114 applies equally to the Government's treatment of that case.

SSgt Saul was willing to admit to. It is entirely about whether the follow-up inquiry could resolve the inconsistent matter that SSgt Saul raised, as required by Article 45.

As previously discussed, SSgt Saul was unfailing and steadfast in his denial of intent. (JA at 48.) Given this, the military judge was charged with unambiguously resolving the contradiction between the plea and SSgt Saul's admission. The military judge's myopic focus on whether SSgt Saul could appreciate a "natural and probable" consequence of his actions, at most, only got halfway there. Rather, the military judge had to get SSgt Saul to commit to the idea that he *specifically intended* those consequences, however natural or probable they may have been. Put differently, the providence inquiry had to foreclose the apparent reality that SSgt Saul did not intend to destroy the windshield. *Henderson*, 426 U.S. at 645. However, the military judge's limited inquiry about "natural and probable" consequences did not resolve the ambiguity surrounding SSgt Saul's intentions behind his actions. Without this, the possibility that SSgt Saul's mental state could only qualify for a lesser, uncharged offense, was unresolved. Accordingly, the military judge's only option was to reject the guilty plea.

The Government suggests that the nature of the guilty plea resulted in Appellant waiving the right to challenge factual issues related to the offense. (Appellee Br. at 17.) The Government refers to the "natural or probable consequences of Appellant striking the windshield . . ." as a "'matter of proof' that

Appellant could have contested at a litigated trial." (*Id.*) In essence, the Government attempts to absolve the necessity of a sound providence inquiry by assuming facts by default as a virtue of the plea itself. A guilty plea does no such thing. The factual basis must be shown through the providence inquiry to validate that it is truly voluntary. *United States v. Care*, 18 U.S.C.M.A. 535, 538 (U.S.C.M.A. 1969). In this case, the Appellant denied the requisite mental state for the offense and refused to voluntarily admit otherwise.

The Government's reliance on *United States v. Faircloth*, 45 M.J. 172 (C.A.A.F. 1996) does not resolve this in the Government's favor. (R. at 17.) In that case, the accused challenged his guilty plea for larceny by arguing on appeal that he did not know who had the actual legal possessory interest of the stolen article, despite admitting on the record that he believed he knew who it was. *Faircloth*, 45 M.J. at 174. The reasoning in that case does not apply here. SSgt Saul never admitted intent and did not provide any facts sufficient to show intent. SSgt Saul does not challenge a factual matter previously admitted, but instead points out the glaring omission of the factual predicate of his plea.

Without case law to establish that "natural and probable" consequences are enough to show intent, the Government instead relies on analogies. (Appellee Br. at 16.) Aside from lacking authority, these analogies are unpersuasive. The Government suggests that much like throwing a paperweight at a mirror, the result

of SSgt Saul's actions were so likely to cause damage to the windshield that he "cannot believably claim that he did not intend to destroy . . ." it. (*Id.*) However, the issue is not whether the Government would be able to meet its burden of proof at trial. The issue is whether SSgt Saul's statements as to intent were inconsistent with his plea and whether it was resolved by the military judge before acceptance of his guilty plea. SSgt Saul's statements were inconsistent with his plea, and the military judge did not resolve that inconsistency by failing to bridge the gap between what could have been a "natural and probable" consequence of SSgt Saul's actions and whether Appellant intended to destroy windshield.

The military judge's follow-up question as to Appellant's mental state, at most, established recklessness—a theory that he was not charged with. However, the military judge had to ask additional questions to foreclose mere recklessness and affirmatively establish intent. *United States v. Bernacki*, 13 C.M.A. 641 (C.M.A. 1963) (holding that the offense of willful and wrongful damage of private property requires proof of actual intention to damage, as opposed to mere reckless disregard of property rights of such magnitude as to imply willfulness.)

This did not occur. Rather, the military judge stopped the discussion at whether the destruction was but one possible consequence of Appellant's actions. (JA at 76-77.) (Appellant answering affirmatively to the military judge's question, "[D]o you agree that you smacking the windshield, a natural consequences of that

action is that windshield will spider out?"). Absent from the inquiry were any questions about whether that possible consequence, however natural or probable, was Appellant's intended result. Without this, the military judge was not presented with a factual basis to support the plea to the offense that Appellant was charged with. This raises a substantial basis in fact and law for questioning the plea which warrants its reversal now on appeal. *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014).

CONCLUSION

SSgt Saul's denial of intent to destroy the windshield presented a matter inconsistent with his guilty plea which was unresolved by the military judge's follow-up questions. This rendered the providence inquiry fatally flawed and should have resulted in the military judge rejecting the plea. Accordingly, SSgt Saul respectfully requests that this Court overturn his conviction and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via email to the Court and served on Air Force Appellate Government Division and the Air Force Appellate Defense Division on August 19, 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 21(B)

1. This brief complies with the type-volume limitation of Rule 24(b)(2) because it contains 3,573 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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